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IN THE

Supreme Court of the United States

Number 20—Original

COMMONWEALTH OF PENNSYLVANIA, Complainant

vs.

STATE OF WEST VIRGINIA, Defendant.

Supplemental Brief for Complainant.

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This Court ordered that this case be restored to the docket for reargument, with special reference to the questions:

> "1. Whether the suit was not prematurely brought as no action has been taken either by the State or by the State Commission under the statute."
>
> "2. Whether the bill presents a cause justiciable between the two States parties to the action."

Complying with said order, answers to these questions, and, in addition, suggestions upon other questions raised during the previous oral argument, are respectfully submitted on behalf of complainant. As far as possible, repetition of the argument contained in the original briefs will be avoided.

I.

"WHETHER THE SUIT WAS NOT PREMATURELY BROUGHT AS NO ACTION HAS BEEN TAKEN EITHER BY THE STATE OR BY THE STATE COMMISSION UNDER THE STATUTE."

This is a suit under the original jurisdiction of this Court. Evidence was offered by complainant in support of the averments of the Bill, and by defendant in support of the averments of the Answer.

This Court, like any other court at *nisi prius*, is bound by the proofs. It must decide the questions of fact under the evidence. This question of "whether the suit was not prematurely brought as no action has been taken either by the State or by the State Commission under the statute," involves both questions of fact and of law.

The question of fact involved is: Would the effects, causing loss of life, health and property, proved by the uncontradicted evidence as sure to follow the enforcement of the statute, wait for the length of time necessary to obtain action by this Court, if complainant had deferred proceedings until after the State or its Commission had acted in accordance with the purpose and intent of the statute, and the powers sought to be given by the statute had been first exercised?

The question of law is: Is any action by the State or by its Commission necessary, before the statute, by its own terms, would produce these very effects which the uncontradicted evidence shows are sure to follow from the provisions of said statute?

This question of fact,—in reality this very suggestion of whether or not the suit was prematurely brought,—involves an intimate knowledge and consideration of the peculiarities and idiosyncrasies of the natural gas industry. It is significant that the defendant and its counsel, familiar with that industry, did not suggest this objection to the filing of this complaint, or the decision of this suit, at this time.

That the State and its Commission had not yet taken action towards the enforcement of this statute, is explained by the preliminary injunction issued by this Court, restraining such action.

Moreover, as said by this Court in *Ludwig, Secy. of State vs. Western Union Tel. Co.,* 216 U. S. 146, page 162:

> "According to well settled rules of statutory construction the validity of a statute, whatever its language, must be determined by its effect or operation as manifested by the natural and reasonable meaning of the words employed. *Henderson v. Mayor,* 92 U. S., 259, 268. If a statute by its necessary operation really and substantially burdens the interstate business of a foreign corporation seeking to do business in the State * * * then it is unconstitutional and void, although said legislature may not have intended to enact an invalid statute."

In *Minnesota v. Barber,* 136 U. S. 313, after citing and discussing authorities, it was said, by this Court at page 320:

> "Upon the authority of this case and others that could be cited it is our duty to inquire in respect to the statute before us not only whether

there is a real or substantial relation between its avowed objects and the means devised for obtaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

The statute under discussion in that case was one passed by the State of Minnesota providing for inspection in Minnesota, within 24 hours before being slaughtered, of beef offered for sale in Minnesota. The beef had been killed in Illinois and shipped to Minnesota. This Court said of this statute, at page 321:

> "The enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question."

And again at page 323:

> "Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute."

It was said by this Court in *Henderson v. Mayor of New York*, 92 U. S. 259, at page 268:

> "In whatever language the statute may be framed its purpose must be determined by its natural and reasonable effect."

The power of a court of equity to prevent by injunction contemplated or threatened injuries before they are actually inflicted, has been applied by this Court in

cases in which the injury was threatened by the enforcement of a State statute in conflict with the Commerce Clause of the Federal Constitution.

In *Savage v. Jones*, 225 U. S. 501, a manufacturer of cattle food filed his bill in equity to prevent the State officials from taking proceedings to enforce an Act of the State requiring the formula to appear on the wrapper on all such goods sold. In that case this Court said:

> "If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain and was entitled to relief against enforcement by the defendant of the illegal demands."

Citing authorities.

The case of *Ludwig, Secy. of State v. Western Union Telegraph Co.*, 216 U. S. 416, involved a statute of Arkansas imposing on interstate companies a license tax for the privilege of filing its articles of incorporation as a condition to doing intrastate business, the license tax or fee being based on the whole capital stock of the company, whether employed within the State or elsewhere. This Court held that a suit to enjoin the enforcement of the statute was properly and timely brought, since to wait until an attempt was made to actually enforce the statute would work irreparable injury on complainant company. This Court said, at page 164:

> "In order to prevent the contemplated or threatened injury to the company the court below

properly made a decree perpetually enjoining the appellant as Secretary of State, his agents and attorneys, from making proclamation that the telegraph company has no authority to continue doing business in Arkansas."

The real inquiry is one of fact. Does the statute in controversy, as claimed by the complainant, "by its effect or operation, as manifested by the natural and reasonable meaning of the words employed," burden, interfere with, and in fact prevent and prohibit, interstate commerce in natural gas, and if it does is the Commonwealth of Pennsylvania justified in praying for this injunction now, before the injury contemplated or threatened, affecting not only property, but life and health, is actually suffered?

To put the question conversely: If by delaying proceedings the citizens of the Commonwealth of Pennsylvania would actually suffer the contemplated and threatened injuries, and action thereafter would be of no avail except to some extent to prevent the continuance of further like injuries, is not said Commonwealth, in the performance of its sovereign obligations to its people, in good faith, bound to proceed at once, without delay?

The whole purpose and intent of the statute, as shown by its terms, by the Answer of the State of West Virginia, and by the argument of its counsel, are hereafter to appropriate to the use of all classes of consumers within the State, domestic, industrial, and others, an adequate supply of gas before permitting any gas produced in the State of West Virginia to be transported across the state line to other States, as has been

the established course of business of these interstate gas companies, encouraged and sanctioned by the State of West Virginia for over a generation.

The uncontradicted evidence of the officials of every interstate natural gas company doing business in West Virginia, and of natural gas experts, shows that the carrying out of this purpose and intent will not only burden and interfere with, but will actually prevent and prohibit, the transportation of all natural gas from the State of West Virginia into other States. It would divert the natural gas, while in transit from West Virginia to other States, to the use of consumers in West Virginia. It would in effect be a seizure by the State of West Virginia, for the use of its own consumers, of natural gas committed to and in transportation in interstate commerce.

To delay action until after this purpose and intent had been carried out and effect accomplished, for whatever length of time, for even a comparatively few days, before this Court could act, would render such action of no practical value to prevent the doing of the wrong and the suffering of the injuries. In this connection this Court's attention is respectfully directed to the following considerations, namely:

1st. All of the dangers to life, health, comfort and convenience, will have been suffered by those deprived of fuel in their homes for cooking, heating, lighting, etc., though it should be for a few days only. Food in the home can be dispensed with, with less danger to life and health, and for a longer period, than can fuel in extreme cold weather.

2nd. As soon as the fuel supply is cut off, other fuel must be immediately substituted. The delay necessary to obtain an injunction, even if the parties and court acted with the utmost expedition, could not be endured, even for a few days, even for a few hours, without loss of life and health to those wholly dependent upon gas for their fuel supply.

3rd. The necessary delay, however short, incident to the change in the appliances necessary to burn other fuel in place of gas, and the obtaining of such other fuel, would occasion all of the loss of life, health, comfort, convenience and property shown by the uncontradicted evidence in the case to be inevitable from the enforcement of the statute, especially when there is taken into consideration the extraordinary demands for such appliances and fuel that would be created by millions of gas consumers clamoring at the same time for plumbers' services and fittings and fuel supplies.

4th. If consumers in Pennsylvania at any time even for a few hours or a few days are compelled to make these changes in appliances requisite for the burning of other fuel than gas (even where the construction of the houses permits such changes) after they have endured the hardships and risks to life and health, and have gone to the expense of making such changes, even though subsequently the court should declare the action of the State unwarranted, all the damage would have been done. The expense to the millions of consumers in Pennsylvania of making these changes would aggregate several hundred millions of dollars.

5th. If consumers and their families in Pennsylvania, aggregating many millions in number, as shown by the testimony, and whom the State of Pennsylvania

as *parens patriae*, represents in this litigation, are entitled, now or at any time hereafter, to the relief sought by the bill of complaint filed and now under consideration, they are entitled to the same without being first subjected to all the horrors and property losses pictured by the uncontradicted proofs in this case as sure to follow from the operation of this statute of West Virginia.

6th. This suit stands on a different footing from the ordinary proceeding by an individual to protect his private rights. It is brought by a sovereign State, pursuant to a resolution adopted by the Senate and House of Representatives and approved by its Governor. This resolution (page 21, Complaint of Pennsylvania; for the convenience of the Court reprinted as Exhibit "A" in the appendix to this brief) recites the facts (now proven by the evidence) as to the dangers to life, health, convenience and comfort, and the property losses to be apprehended from the enforcement of this statute, and directed the appeal to this Court to protect the millions of its citizens from these horrors and losses, because without action by the State these citizens were remediless. Could this State, without being recreant to its sovereign obligation, before putting into motion the machinery of the law for the protection of its citizens, have waited until much, if not all, of the evils to be apprehended had been suffered by its citizens? If by prompt action this State could save the life of a single citizen, or the health of a single family, (however poor —and the poor would suffer the most), was not its action *now* justified?

Where the complainants are States the same rule does not obtain as in litigation between private parties. When the lives and health of its people are involved the

State should act at once. No nice balancing of probabilities ought to be tolerated.

As was said by this Court in *Georgia v. Tennessee Copper Company,* 206 U. S. 230, at page 237, Mr. Justice Holmes delivering the opinion:

> "Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendant's business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.
>
> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they

better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law."

7th. If it can be presumed (which complainant avers it cannot), considering the terms of the statute, and the avowed purpose and intent as to the enforcement and the interpretation thereof by the State of West Virginia, as declared in its Answer, that said statute will not be so enforced as to prohibit, prevent, interfere with or burden interstate commerce in natural gas by its transportation out of the State of West Virginia, any decision of this Court as prayed by the complainant that said statute is unconstitutional to this extent, could not prejudice the rights of said State or deprive it of any prerogatives it might legally possess.

All of the foregoing reasons apply equally to the State of Pennsylvania, as a consumer of gas in its public institutions, such as homes, hospitals, houses of correction, etc., and to the municipal subdivisions of said State.

The only reason why this suffering by millions of consumers in Pennsylvania, and this property loss, aggregating hundreds of millions of dollars, have not already been imposed upon them by the operation of this statute, is because the operation thereof was en-

joined by this Court, pending the final determination of the questions now under consideration. If, after the vital organs of a patient have been removed by a surgical operation, the doctors in consultation agree that the operation should not have been made, such decision would afford the patient no relief, nor would it restore his organs!

Let it be noted that no action of the State itself, nor any of its officers, is required for the enforcement of the statute. Section One, without any further action by the State officials, courts or commission, absolutely compels every gas company to furnish an adequate supply to the public of West Virginia for all purposes for which natural gas may be desired by said public.

In the Answer filed by the State of West Virginia the State admits that it proposes to enforce this statute, even to the extent of enforcing the fines, penalties and imprisonment in the statute prescribed. (Answer, p. 44). It further admits that whether or to what extent under the changed conditions brought about by the enforcement of said statute the demands of the consumers in West Virginia would deplete or diminish the supply of gas available for transportation into Pennsylvania, will be dependent upon circumstances and contingencies referred to in the Answer.

The State of West Virginia further claims in its Answer that the effect of said statute will be to give to all of the consumers in West Virginia in the statute mentioned, to the extent of the gas mentioned, a reasonably adequate supply of gas, and says that the gas is affected with the use or interest of the said public of West Virginia, and claims that this use or interest of

said public is superior and prior to any rights flowing from the introduction of said gas into interstate commerce.

It follows, therefore, from the terms of the Act itself that no further action of the State of West Virginia is necessary, and from the averments of the Answer the State unequivocally asserts its intention to enforce the Act, even by fines, penalties and imprisonment.

Under the Second Section of the Act, which provides for a supply of gas to other public service companies by gas companies having a surplus *over and above what is required to supply their consumers in West Virginia,* the Public Service Commission is given authority to order said delivery and compulsory connection of lines for that purpose. The only discretion of the Commission is as to the convenience and necessity of the *West Virginia public.* The Section expressly authorizes such order by the Commission if the company has a supply in excess of the quantity sufficient *for all consumers in West Virginia who may desire to use gas.*

The fines and penalties provided by this Act are so great, each day being made a separate offence, that no company would dare to disobey the orders of the Commission, even long enough to raise the question of constitutionality of the Act by proper proceedings in the courts. Litigation for any length of time if unsuccessful would almost bankrupt any company. The imprisonment that would follow from even a short delay might mean incarceration during the lifetime of any officer of the gas company contesting the constitutionality of the statute.

As was said by Mr. Justice Brandeis, in *Oklahoma Operating Company v. Love,* 252 U. S. 331, page 336, of the statute then under consideration, the penalties whereof were nothing like as severe as those provided for in the statute in controversy:

> "But the penalties which may possibly be imposed if it pursues this course without success are such as well might deter even the boldest and most confident."

While the provision imposing the fines and imprisonment provided by the statute in controversy might be declared unconstitutional, if that question were raised by some bold and confident officer of one of the interstate companies, nevertheless, with such deterrents, in all reasonable probability any one of the interstate companies would find it less dangerous to comply with the statute than to raise the question of its constitutionality.

If, therefore, in cold weather, these compulsory connections are made and the interstate gas companies are compelled to make up the deficit of all local companies before the State of Pennsylvania could take any action whatever, it is manifest its people consuming natural gas would be subjected to the hazards to life, health, convenience and comfort, as well as property losses, described in the Bill of Complaint and proven by the evidence to follow from the enforcement of this provision of the statute.

The Answer of the State of West Virginia sets forth in explicit terms the contention of said State, that all gas produced in the State of West Virginia must be first applied to furnishing an adequate supply to all consumers in West Virginia who may desire to use the

same, before any of said gas can be introduced into interstate commerce or transported out of the State. This may include such use as for carbon black manufacture, generally condemned as being most wasteful. Can it be open to question, from the terms of the statute, the averments of the Answer, and the argument of counsel for the State of West Virginia, that its purpose and intention are to compel the application of all the gas produced or transported in the State to the supply of domestic, industrial and other consumers in that State who may desire the same for any purpose whatever before any thereof can be taken out of the State?

Nothing remains, therefore, to be done by the State or by its Public Service Commission, except, of course, the carrying out of this purpose and intention by the actual seizure of the gas for use within the State. To delay action, therefore, until after this actual seizure is made, *which seizure the State of West Virginia avows its purpose and intention to make,* would render valueless for the protection of citizens of Pennsylvania, any judgment or decree of this Court afterwards delivered or made.

The foregoing argument has been made principally upon the theory of a controversy between private individuals. Under the sixth reason above given why this suit was not prematurely brought, it was shown by citations from this Court that in suits where the complainant is a State, "if it has a case at all it is somewhat more certainly entitled to specific relief than a private party might be," and that other "peculiarities necessarily mark a suit of this kind."

In the case in controversy the legislature by formal action by both Houses, approved by the Governor, authorized and directed the Attorney General to institute

such legal proceedings and to do all other acts necessary to protect the rights and interests of the Commonwealth of Pennsylvania and of its citizens, etc.

The resolution recited the dangers to health, comfort, convenience and welfare of the people of the State from the enforcement of the statute in controversy, as well as the enormous property losses to which they would thereby be subjected.

There was no alternative left to the Attorney General by this action of the constituted authorities. There was no discretion left to the Attorney General. The dangers to health, comfort, convenience and welfare of the people and their threatened property losses are formally recited by the resolution.

What State official thereafter had the right to say "Such results may not follow. Had we better not wait and see?" Wait for what? See what? Whether or not the gas supply to consumers in Pennsylvania under the operation of the statute in controversy will be so diminished as to really affect the health and welfare of such consumers? What family or families are to be selected on which to try the experiment? How far must the experiment go? How many are to die, or get pneumonia or tuberculosis, before action should be taken?

Can a State thus deal with life and death, health and sickness, and not bring down upon itself the execration of all right-minded men?

If this statute in controversy at any time, now or hereafter, threatens to produce the dangers and damages alleged and proved, the State has the right, and it is its bounden duty to its people, before it is too late, by the loss of a single life or the health of a single family, to protect its people.

II.

"WHETHER THE BILL PRESENTS A CAUSE JUSTICIABLE BETWEEN THE TWO STATES PARTIES TO THE ACTION."

The temptation is with difficulty resisted to trace the historical development of this jurisdiction of this Court, when all the nations of the world at this time are considering the establishment of some great International Court to settle disputes between nations. Compacts and treaties have been made with this purpose. Societies have been organized of great publicists to make propaganda for the establishment of such a court,—a court having the same jurisdiction between nations as is possessed by this Court between the States of this Union.

As was said by Chief Justice Fuller in *Kansas v. Colorado*, 185 U. S. 125, at page 146, of this jurisdiction of controversies between States:

> "Sitting, as it were, as an international as well as domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand. * * *"

It was said of this jurisdiction of this Court in controversies between States, by William Wirt, in his argument in the case of *Cherokee Nation v. Georgia*:

> "The erection of such a tribunal was a sublime conception and worthy of the minds which planned our Constitution."

Beginning with the quarrels between the Colonies, before the Revolution, such as those between the Penns

and Lord Baltimore, continuing after the adoption of the Articles of Confederation, when a method was provided for arbitration between the States, and which furnished the suggestion of the system of original jurisdiction which was contained in the Constitution, it was manifest to the lawyers of pre-Revolutionary times that such original jurisdiction to determine disputes between the States must be conferred on some tribunal. The power conferred was general. There were no limitations in the constitutional provision conferring such power. As was pointed out by this Court in *Kansas v. Colorado*, 206 U. S. 46, in the opinion by Mr. Justice Brewer, at pages 81, 82 *et seq.*, that while as to its legislative powers this Government is acknowledged by all to be one of enumerated powers and that it can exercise only the powers granted to it:

> "On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that 'the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.' By this is granted the entire judicial power of the nation. Section 2, which provides that 'the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,' etc. is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial

power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising."

It was under this general grant of power that this Court, in *Chisholm v. Georgia,* 2 Dall. 419, held that this Court had jurisdiction in a suit brought by a citizen against a State. That decision led to the adoption of the Eleventh Amendment to the Constitution, which prohibited such actions in the future.

This Court, under this general grant of power, in 1794, in the case of *Georgia v. Brailsford,* 3 Dall. 1, tried a case before a jury, and after the jury had been charged by Chief Justice Jay, the verdict found for the defendant was duly entered.

Under this general power, as relating to controversies between the States, this Court has developed a jurisprudence founded on principles of universal application to the Federal law, to State law, and to international law, and founded upon an association of sovereign States, independent yet united, united by an agreement —the Constitution—the enforceability whereof is vested in the Supreme Court.

As was natural, in the eighty odd cases of controversies between the States that have come before this Court, objections have been made to this jurisdiction from time to time upon diametrically opposite grounds. For example, in the case of *Rhode Island v. Massachusetts,* 12 Pet. 657, Daniel Webster argued that the jurisdiction of suits between States extended only to matters ordinarily judicially cognizable, and not to suits of a political character, such as boundaries; while in later

cases exactly the opposite was contended, to wit, that the jurisdiction related solely to political questions, such as boundaries, etc.

These eighty odd cases have been controversies over a wide range of subjects,—over boundaries, riparian and fishery rights, public health, interstate commerce, obligations of the States, political and territorial questions arising out of the Civil War, etc., etc.

In the case of *Missouri v. Illinois*, 180 U. S. 208, Mr. Justice Shiras, in delivering the opinion of the Court (p. 218) reviewed the history of the grant to the Supreme Court of power over controversies between the States. He reviewed many cases in this Court, *New York v. Connecticut*, 4 Dall.; *New Jersey v. New York*, 5 Pet.; *Florida v. Georgia*, 11 How.; *Pennsylvania v. Bridge Co.*, 9 How, 11 How., 13 How., and 18 How.; *South Carolina v. Georgia*, 93 U. S.; *Wisconsin v. Duluth*, 96 U. S.; *New York v. Louisiana*, 108 U. S.; *Wisconsin v. Insurance Co.*, 127 U. S.; *Hans v. Louisiana*, 134 U. S.; and *Louisiana v. Texas*, 176 U. S.; and after this review propounded this question:

> "From the language of the Constitution and from the cases in which that language has been considered, what principles may be derived as to the nature and extent of the original jurisdiction of this Court in controversies between two or more States?"

He then states that from the language alone considered it might be concluded that, wherever a State made complaint against another State, jurisdiction attached, regardless of the nature of the complaint. He added, however:

> "But it must be conceded that upon further consideration in cases arising under different states

of facts, the general language used in *Cohens v. Virginia* has been to some extent modified."

He then cites the different classes of cases and discusses them, and calls attention to the fact that while the jurisdiction in those cases involved boundaries and jurisdiction over lands and their inhabitants, and in some instances directly affected the property rights and interests of a State, he concludes this review:

> "But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.
>
> An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, *if the health and comfort of the inhabitants of a State are threatened,* the State is the proper party to represent and defend them. If Missouri were an independent and Sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are now considering.

> The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.
>
> That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

The foregoing opinion was delivered upon a demurrer to the bill of complaint. Upon the overruling of the demurrer the case went to trial, and when it came before this Court for final determination upon the evidence, (*Missouri v. Illinois,* 200 U. S. 406), this Court, by Mr. Justice Holmes, said, of the former decision in the case, (p. 518):

> "* * * The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt."

The case of *Kansas v. Colorado,* 185 U. S., 125, followed the decision of this Court on the demurrer in *Missouri v. Illinois.* In that case the opinion was delivered

by Chief Justice Fuller, (page 139 *et seq.*) in which he said, (p. 141):

> "* * * And as the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument."

He then cited with approval the opinion in *Missouri v. Illinois, and continued,* (p. 142):

> "As will be perceived, the court there ruled that the mere fact that a State has no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae,* trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution."

The State of Colorado asserted its selfish interests just as the State of West Virginia asserts hers in this case. As stated by Chief Justice Fuller, (page 143), the State of Colorado insisted that she, as a sovereign and independent State, if her material welfare demanded it, had the right to consume for beneficial purposes all the waters within her boundaries. (Substitute "gas" for "water," and West Virginia makes the same contention here).

Colorado further insisted that by the law of nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture and commerce, are rights of sovereignty; that she has dominion over all things within her territory; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between States; and that the only controversies that are justiciable in the Supreme Court are those which prior to the adoption of the Constitution would have been just cause for reprisal, etc.

Speaking of these contentions, this Court, by Chief Justice Fuller, said, (p. 143):

> "But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well-founded? The States of this Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.
>
> As Mr. Justice Baldwin remarked in *Rhode Island v. Massachusetts*: 'Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State. * * *."

This case came before this Court on final hearing after the evidence had been taken in *Kansas v. Colorado*, 206 U. S. 46. The opinion was delivered by Mr. Justice Brewer, beginning at page 80. Said the Court:

"While we said in overruling the demurrer that 'this court, speaking broadly, has jurisdiction,' we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty."

The Court then proceeds to consider the foundations of its jurisdiction over controversies between States, and concludes, (page 83):

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto."

In the above case the principles laid down in *Missouri v. Illinois* were then adopted and applied and the jurisdiction of the Court upheld.

In *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, this Court held that a suit by a State for an injury to it in its capacity of quasi-sovereignty, even without any direct financial interest, could be maintained, and said, (page 237):

> "The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*, 200 U. S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. *Missouri v. Illinois*, 180 U. S. 208, 241."

In the latest utterance of this court on this subject, in the case of *New York v. New Jersey*, decided in May, 1921, and reported in the United States Supreme Court Advance Opinions, at page 544, it was said, by Mr. Justice Clarke, (p. 547):

> "* * * the right of the State to maintain such a suit as is stated in the bill is very clear. The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the state is

the proper party to represent and defend such rights by resort to the remedy of an original suit in this court, under the provisions of the Constitution of the United States. *Missouri v. Illinois,* 180 U. S. 208, 241, 243 * *; *Georgia v. Tenn. Copper Co.,* 206 U. S. 230. * * * ."

It will be observed that in the cases of *Kansas v. Colorado, Georgia v. Tennessee Copper Co.,* and *New York v. New Jersey,* the complainant States had no pecuniary interest, but appeared as *parens patriae* or trustee for their people, for the protection of their lives, health, comfort and convenience. In none of these cases, except that of *Georgia v. Tennssee Copper Co.,* could the individual citizens of the complainant States have maintained a suit, and in each of these cases only a portion of the citizens of the State were affected by the proposed action of the defending State. All of these conditions obtain in the case at bar.

It would seem that this Court, in *Missouri v. Illinois,* 180 U. S.; *Kansas v. Colorado,* 185 U. S.; *Missouri v. Illinois,* 200 U. S.; *Kansas v. Colorado,* 206 U. S.; *Georgia v. Tenn. Copper Co.,* 206 U. S.; and *New York v. New Jersey,* Advance Opinions, not yet reported; *supra.*; has unwaveringly and unflinchingly adopted the rule laid down by Mr. Justice Shiras in *Missouri v. Illinois,* 108 U. S., to the effect that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them," in its capacity of *parens patriae* or trustee for its people, and that this court has original jurisdiction in such actions.

Under the averments of the bill of complaint and the proofs in the case, the complainant State has appeared to protect the lives, health, comfort, convenience and the rights of its citizens.

There is nothing in the case of *Louisiana v. Texas*, 176 U. S. 1, so much relied upon by the defendant, the State of West Virginia, in its argument against jurisdiction by this Court, that militates against the foregoing contention. In that case the action was brought by the State of Louisiana against the State of Texas on account of the latter's quarantine laws, or rather the manner of the enforcement thereof, claiming that it prevented citizens of Louisiana, and especially of New Orleans, from engaging in interstate commerce with people in the State of Texas; and it was to enforce this right of such citizens of Louisiana so to engage in interstate commerce, that the suit was brought by the State as *parens patriae*, etc. of such citizens.

Moreover, in the case of *Louisiana v. Texas* it was not contended by the State of Louisiana that the Texas quarantine law was void, but the sole contention was that the health officer of Texas, by rules and regulations which were approved by the Governor, produced the infraction of the Constitutional provision protecting interstate commerce. The State of Louisiana was attempting to enforce the rights of certain of its citizens to engage in commerce with citizens in Texas.

This distinguishing feature of the case from the principle laid down in *Missouri v. Illinois*, is referred to by this Court in its opinion in the latter case, (180 U. S. 208, 237), referring to its former opinion in the case of *Louisiana v. Texas*, in these words:

> "After quoting the provisions of the statute of the State of Texas, regulating the subject of quarantine, the Chief Justice proceeded to say:
>
> 'It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate

commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government. * * * The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the Governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

'But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. Where there is no agreement, where

breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

'In our judgment, this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution.' "

It was admitted in the case of *Louisiana vs. Texas* "that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government," and it was the improper enforcement of such a quarantine law of which the State of Louisiana complained, because it alleged that thereby some of its citizens were prevented from engaging in interstate commerce with citizens of Texas.

If, therefore, the statement of this Court that:

"* * * Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large."

be considered with reference to the facts of the case

and the situation there described, it will be manifest that the same cannot affect the question of jurisdiction in this case, where the complaint is that the State of West Virginia has passed a law that is unconstitutional, and which law affects the lives, health, comfort and convenience of millions of the citizens of the State of Pennsylvania.

There is no question here of the complainant State undertaking to vindicate the right of its citizens to engage in interstate commerce. The case in controversy comes squarely within the principle laid down by this Court in the authorities above referred to.

The only other question, therefore, that would seem to be open is: Is the question at issue in this controversy justiciable? In other words, applying the rule laid down by Mr. Justice Brewer in *Kansas v. Colorado,* the jurisdiction "must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation no matter who may be the parties thereto."

That action by a State prohibiting, interfering with or imposing a burden upon interstate commerce, or impairing the obligations of contracts, or taking property without due process of law, or denying to citizens of other States the privileges and immunities granted to its own citizens, presents questions justiciable under the Constitution and laws of the United States has been decided by this Court again and again. There are hundreds of such cases in the reports of the decisions of this Court. The questions presented by the complaint, and the questions raised by the answer, in the case in controversy, are therefore justiciable questions. That

the State of Pennsylvania acting under authority of and by virtue of directions contained in the resolutions adopted by the legislature of that State, approved by the Governor, to take such action as *parens patriae* and trustee of its people as the officials of that State deemed proper, has the right to maintain such action, has been adjudicated by this Court in the foregoing authorities. If such State has no such right to proceed, then are millions of its citizens affected in their lives, health, comfort, convenience and property wholly without remedy. None of them under the Eleventh Amendment could institute a proceeding against the State of West Virginia to have this law declared unconstitutional. Before the Eleventh Amendment was adopted such a suit could have been maintained by individual citizens, and this Court would have had jurisdiction because a justiciable question was presented. Why then may not the State, as the representative of the welfare of its citizens, whose lives and health are threatened, maintain such a suit, and is the question thus presented any the less justiciable? It is just such a situation as is presented in this controversy which, before the adoption of the Constitution, would have led to embargoes and reprisals, perhaps war.

As graphically stated by Mr. Justice McKenna, in *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, of a statute which attempted by indirection to prohibit interstate commerce in natural gas:

> "If the States have such power a singular situation might result. Pennsylvania may keep its coal, the Northwest its timber, the mining States their minerals, and why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out.

> To what consequence does such power tend? If one State has it all states have it; embargo may be retaliated by embargo and commerce will be halted at state lines."

The foregoing argument has taken no account of what ought to be a complete answer to this question of jurisdiction. The State of Pennsylvania, as shown by the bill of complaint and by the proofs, as the owner of a large number of State institutions, using natural gas, as well as through its municipal subdivisions using natural gas—all under contract—are directly and in its own interest pecuniarily and otherwise interested in this controversy. On that account alone it has the right to maintain this suit for the protection of those rights, whether or not any of its citizens or people were likewise so interested. It will not do for the State of West Virginia to attempt to brush aside this interest with the statement (page 75, defendant's brief of argument):

> "The substantial ground upon which the plaintiffs sue is the individual grievances of their citizens sought to be redressed by the plaintiffs in their character of *parens patriae*. Subsidiary and trifling in comparison are their complaints of shortage of gas in municipalities and public institutions."

True it is that comparing the property rights of the State involved in this controversy with those rights of its citizens, the losses by the State of Pennsylvania would be out of proportion (but not even then "subsidiary and trifling"), aggregating perhaps only a few millions of dollars, as compared with hundreds of millions, and that in comparison with the lives, health, comfort and convenience of the millions of its citizens, the lives, health, comfort and convenience of only some

thousands of the wards of the State would appear disproportionate. Nevertheless the State has the right, and it is its duty, to protect the lives, health, comfort and convenience of these its own particular wards, though they aggregate but a few thousand. In fact, it owes to them a peculiar duty of protection, because they were so unfortunate as to have become State wards. So, too, the State has the right to protect its own property interests.

The argument (Defendant's brief, p. 75), "that while sovereign States have sued, these cases are controversies between West Virginia and certain gas companies," is wholly gratuitous. There is not a scintilla of evidence to justify this statement. It impugns the honesty and integrity not only of the Governor, the Attorney General, and other State officials, but of the members of the legislature of Pennsylvania which by unanimous action passed resolutions directing the State officials to institute this action.

In the bill of complaint Pennsylvania specifically sets forth that as party complainant it brought its suit for the protection of its own rights and interests, and in its own behalf, as well as in its representative capacity. Considered solely with reference to the protection of the rights and interests of the State as a State, complainant would have the same standing in this suit as a private party to demand the protection of those rights. That the value of the property, directly owned by the State, and the number of its own peculiar wards, the lives and health of whom the State is taking this action to protect, are so much less in comparison with the property rights of its people and their numbers, the lives and health of whom the State is taking this action to protect, naturally casts into shadow the direct inter-

tests of the State. Considered alone, however, those direct interests would be great and important enough to engage the attention of this Court or any other judicial tribunal in the world.

Treating the cases as brought by complainant in its representative capacity, it is respectfully submitted that this Court has jurisdiction of this controversy, whether the question of jurisdiction be tested by the principles laid down by this Court, by the principles upon which our government was established, or by the universal rule of construction of considering the mischief and the remedy. Thus, as has been shown, this Court laid down the general principle *"if the health and comfort of the inhabitants of a State are threatened the State is the proper party to represent and defend them," "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens."*

There was a still broader principle enunciated by this Court, applicable to the present controversy, when this Court said the jurisdiction *"must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto."*

There is still another foundation of jurisdiction, comprehensive and far-reaching, referred to by this Court in *Kansas v. Colorado, supra.* That ground involves the fundamental considerations upon which this nation was formed. It was said by this Court, through Mr. Justice Brewer, in the above stated case, (page 80):

> "It is well, therefore, to consider the foundations of our jurisdiction over controversies between States. It is no longer open to question that by

the constitution a nation was brought into being and that that instrument was not merely operative to establish a closer union or league of States."

After referring to the enumerated legislative powers, as contrasted with the entire judicial power, granted to the nation, this Court laid down the principle that the judicial power of the nation extended to all controversies justiciable in their nature, the parties to which, or the property involved in which, may be reached by judicial processes, etc.

That the question involved here, if this suit had been brought by a private party, is justiciable, to wit, an inquiry as to whether a statute is in violation of the Constitution,—is shown by the hundreds of cases in this Court in which those questions have been considered and decided. That they should be justiciable as between States, the same as between private parties, would seem to follow. Why may not one of the States of the Union complain in this Court of another State of the Union enacting a statute in violation of the very agreement which created this Union, bound the States together, and gave jurisdiction to this Court to enforce that agreement. If the jurisdiction of this Court is tested by the general rule of construction to consider the mischief, and then the remedy by which the same is to be removed, again every reason appeals for the retention of jurisdiction. The power to negotiate and contract, make reprisals, establish embargoes, and resort to force, was taken away from the States by the Constitution. In place thereof, jurisdiction in this Court was substituted. The usual procedure if the States had remained sovereign, and West Virginia had passed the statute in controversy,—a statute claimed by Pennsylvania to grievously affect its inhabitants,—would

have been, first, protestations and then negotiations; this failing, reprisals by one embargo and then another. Perhaps total exclusion of all intercourse would have followed, or a wall of customs duties established. West Virginia would no doubt have retaliated; result, ultimately war. But Pennsylvania can neither negotiate, contract, establish embargoes, institute reprisals, or resort to force. Its only remedy, provided by the Constitution, is suit in this Court.

If this Court under the facts of this case, has no jurisdiction, then, notwithstanding surrender by the States to the Nation of the power to protect their people, the people of the State are at the mercy of any State which influenced by selfish or mistaken policy enacts a law, frankly in conflict with the Constitution of the United States. If under such circumstances a State cannot sue a State in this court, the people cannot sue a State anywhere under the Eleventh Amendment, and therefore a law frankly in conflict with the Constitution can be enforced by the enacting State, though it inflicts the loss of life, health and property upon the citizens of sister States.

III.

IS THE ALLEGED OBLIGATION OF THE PUBLIC SERVICE GAS COMPANIES IN WEST VIRGINIA (AUTHORIZED BY CHARTER TO SUPPLY GAS IN WEST VIRGINIA AND ELSEWHERE) TO FURNISH WEST VIRGINIA CONSUMERS WITH A REASONABLY ADEQUATE SUPPLY OF GAS, SO MANDATORY AND PREFERENTIAL THAT THEY ARE COMPELLED TO OBSERVE THIS OBLIGATION AS SUPERIOR AND PRIOR TO THEIR OBLIGATIONS AS TRANSPORTERS OF SAID GAS IN INTERSTATE COMMERCE, AND CAN THE STATE OF WEST VIRGINIA, CONSEQUENTLY, EVEN WHEN THE GAS IS IN TRANSIT IN INTERSTATE COMMERCE, COMPEL THESE INTERSTATE TRANSPORTATION COMPANIES TO DIVERT THIS GAS FROM SAID INTERSTATE TRANSPORTATION IN ORDER TO FURNISH THIS ADEQUATE SUPPLY TO CONSUMERS IN WEST VIRGINIA?

This question involves the consideration of:

1st. What is the obligation of public service natural gas companies to the State of West Virginia?

2nd. When does this natural gas, after being reduced to possession, enter into the stream of interstate commerce?

3rd. If in conflict, which is paramount,—obligations under the constitution and laws of West Virginia, or obligations under the constitution and laws of the United States?

Apply this contention of the State of West Virginia to a public service company engaged in the business of transporting coal, such as a railroad company. The railroad company is a public service corporation in the State of West Virginia, the same as a natural gas company. It owes to the State the obligation adequately to serve the public of West Virginia. It has the right of eminent domain and the right of condemnation of rights of way, the same as a natural gas company. It must be assumed that those rights are granted on condition (as argued in the brief of defendant with reference to natural gas companies) that the corporation furnishes this adequate service to the public of West Virginia. Could the State of West Virginia demand, and by statute compel, the railroad company to adequately supply cars to all of the public of West Virginia along its lines, even if thereby the railroad company was prevented from carrying freight in transit to points outside the State?

Again, apply the contention to an oil pipe line company transporting oil from West Virginia into other States. The pipe line company has the right of eminent domain, condemnation, etc., and owes as a public service corporation the same obligations to the State as does a natural gas company. Could the state by statute compel delivery to the refineries in West Virginia along the line of this pipe line company of the oil in the pipe lines which was in transit to points beyond the State until such refineries had obtained an adequate supply, if the effect thereof would be to prevent the delivery to refineries outside the State of the oil in transit to them under contract for delivery?

To maintain the position of West Virginia there must be some State Divinity, heretofore unknown to the law, which doth hedge this natural gas about, and which is applicable to no other product of the State.

1st. WHAT IS THE OBLIGATION OF PUBLIC SERVICE NATURAL GAS COMPANIES TO THE STATE OF WEST VIRGINIA?

It is not proposed to repeat here the argument under VII (a), pages 94 to 104 of the brief of the State of Pennsylvania, heretofore filed. Brief reference will be made to additional authorities, and some of the authorities cited by defendant will be analyzed so as to show their inapplicability.

Act of 1891, Chap. 113; West Virginia Code, Chap. 52, Sec 24, provides:

> "that a company organized for the purpose of transporting natural gas, petrolem or water * * may enter upon any land for the purpose of examining and surveying a line for its tubing and pipes, and may appropriate so much thereof as may be deemed necessary * * such appropriations shall be made and conduced in accordance with the law providing for compensation to the owners of private property taken for public use * * * . Such company shall, for the purpose of transporting natural gas, oils and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State."

Code of West Virginia, Ch. 42, Sec. 20, provides that where a public utility desires to condemn a right

of way and objection is made to the valuation placed upon the land by the Commissioners, such public utility shall have the right to enter upon the premises and commence its work upon paying into court the sum ascertained by the report of the Commissioners. However, as to "a pipe line company organized for the purpose of transporting carbon oil or natural gas, or both, by means of pipes or otherwise", such companies, instead of paying into court the sum ascertained by the report of the Commissioners, may elect to give bond for such sum, and thereupon may enter upon the premises and proceed with the laying of their line.

The business of these companies was twofold:

1st. Transporting and supplying gas in the State of West Virginia, constituting but a small percentage of their business, as admitted by the defendant.

2nd. Transporting gas through the State of West Virginia to markets in other States, which was and is their principal business, as contended by the defendant. (It assigning from 74% to 80% to export; Defendant's brief, page 19).

In the brief of the State of West Virginia attention is called to certain petitions filed by certain natural gas companies in condemnation proceedings in West Virginia, to show that these companies intended to use such lines to supply gas to the public in West Virginia. An examination of such petitions, however, shows that the petitioning company named those cities, towns or localities to which it was supplying gas, which it had of its own accord undertaken to supply, or that the petition was for the purpose of building a transportation line, in accord with the powers granted to such companies in their charters and in Chapter 52, Sec. 24, quoted above.

On page 89 of its brief the State of West Virginia states:

> "That these companies would have received the above special rights and privileges except upon the terms of affording adequate service to the public of West Virginia, or in contemplation of the subordination of that service to that of the people of other States, is unthinkable."

This statement ignores the chronology of events. The statute granting these powers was passed in 1891, over 30 years ago. The charters to these gas companies gave them the right to produce, transport and supply gas not only in West Virginia, but *"elsewhere."* Two of the largest of these companies, The Manufacturers Light & Heat Company and the Carnegie Natural Gas Company, were chartered by other States and were engaged in the natural gas industry in other States, and came into West Virginia to get a supply of gas for those other States as well as for such consumers as they might thereafter obtain in West Virginia.

As stated in the brief for the State of West Virginia, speaking of the inception and growth of this transportation of gas for consumption in other States, (page 16):

> "No program of conservation was adopted or attempted, nor were efforts made to restrict the enormous and continually increasing volume of gas which, in later years, certain of its public service corporations transported, or sold for transportation, to consumers in other States. The right of these public service corporations so to dispose of their surplus in other States was not only recognized, but substantially sanctioned by permitting

> them to exercise the power of eminent domain for the construction of pipe lines transporting chiefly for foreign consumption."

While this statement in the brief has the qualification that it was,

> "subject only to the duty of first serving West Virginia consumers in the territory through which such lines extended."

this qualification begs the whole question at issue. The quotation is given for the facts admitted. The qualification is an argument only.

The evidence shows that at this time the enormous production of gas in West Virginia was far in excess of any demand in West Virginia, and this encouragement to the natural gas companies engaged in transportation to other States was an inducement to invest millions upon millions of dollars to develop the resources of the State. This, as has already been shown, resulted in great benefit to the State.

Oil companies were given the same powers and privileges for the same reasons, which resulted, in like manner, in the development of the oil territory of the State, to its great advantage.

It will be noted that the statute refers to companies engaged in the business of *transporting*. In no single sentence is the word "supplying" or "furnishing" even mentioned.

These companies were made common carriers under the statute. The statement of West Virginia, on page 90 of its brief, that "these companies * * * refuse to transport for other producers gas which might serve the

public in West Virginia," is wholly gratuitous, because not supported by a scintilla of evidence. It may be that the use of such companies as common carriers of gas may not be usual, but that may be explained by the peculiarities of the transportation of natural gas. Unlike coal or other commodities, gas cannot be taken out of the pipe line at a certain destination and put into cars, tanks, barrels, or on a platform. The consignee at destination must have a pipe line system, compressors, etc., and a market for its distribution.

The proposition that these natural gas companies, because public utilities, owe to the State of West Virginia the obligation of furnishing a reasonably adequate supply "for public use within the territory of this State," or if these words of the statute be disregarded or restricted and this obligation be construed "for the use of the public and every part of the public within the territory of this State in or from which such gas is produced or through which said gas is transported or which is served by such person," must be supported in one of three ways:

(a) By the common law.

(b) By statutory obligation.

(c) By the charter of the company.

(a) *No Such Obligation as that Claimed Exists at Common Law; the Statute Enlarges the Territory to be Supplied.*

That this obligation, thus enlarged, is not a common-law obligation has been shown by the authority of this and other courts in the brief of the Commonwealth of Pennsylvania, pages 94 to 103, and will not be here

repeated. The authorities cited to the contrary in the brief of the State of West Virginia do not sustain its contention, with the exception of the forced construction put upon the case of *Gas Company v. Swiger*. That decision is not binding upon this Court for two reasons:

(a) The particular statement in the opinion quoted in defendant's brief was mere dicta not directly involved in the issues before the Court.

(b) The courts of the United States are not bound by the decision of a State court as to what is or is not the common law of that State, but will decide that question according to their own judgment, as was said by this Court in *Smith v. Alabama,* 124 U. S. 465:

> "A determination in a given case of what that law (the common law) is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad *Company v. Lockwood,* 17 Wall. 357. The common law prevailing in the State of New York with reference to the liabilitiy of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State."

In *Gas Co. v. Swiger*, 72 W. Va. 557, relied upon by the State of West Virginia, it was said by Judge Miller, delivering the opinion of the court (as quoted with the asterisks from the brief of the State of West Virginia, p. 91):

> "We observe that the Legislature, by general law, has conferred upon pipe-line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. * * * Pipe-line companies organized for transporting gas must serve the public with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves or by statute, or by contracts or ordinances of municipalities. * * The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation."

(Citing *Charleston Gas Co. v. Lowe*, 52 W. Va. 662; *Hydro-Electric Co. v. Liston*, 70 W. Va. 83; *Calor Oil & Gas Co. v. Franzell* (Ky.) 109 S. W. 328; *Olmstead v. Morris Aqueduct*, 47 N. J. L. 311; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; *Munn v. Illinois*, 94 U. S. 133).

Taking those words of Judge Miller with their context and inserting the omitted words shown by the asterisks, it will appear that what Judge Miller was referring to was that the public use must be fixed and definite and on terms and charges fixed by law. The whole paragraph (72 W. Va. 571) is as follows:

"On the first proposition, that the public use must be fixed and definite, and on terms and charges fixed by law, we observe first, that the legislature by general law has conferred upon pipe line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. Pipe lines for transporting oil must carry oil, as railroads must carry passengers and freight, at reasonable rates, if such rates are not fixed by statute. Pipe line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities. Are not the rights of the public so fixed sufficiently definite to answer the requirements of the law? We think so. The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation. *Charleston Gas Co. v. Lowe, supra,* and *Pittsburgh Hydro-Electric Co. v. Liston,* 70 W. Va. 83, recent decisions of this court support these conclusions. *Calor Oil & Gas Co. v. Franzell* (Ky.) 109 S. W. 328, as well as *Olmsted v. Proprietors of the Morris Aqueduct,* 47 N. J. L. 311, are likewise in point. So also are the cases of *Gibbs v. Balt. Gas Co.,* 130 U. S. 396; *Munn v. Illinois,* 94 U. S. 133."

In other words, as gas transportation companies are made common carriers by the statute, they must

serve the public with gas along the entire line by receiving same for transportation and transporting and delivering the same for reasonable rates, like railroads and oil pipe line companies.

However, all of this is mere dicta. The issues involved in that case were the condemnation of a right of way under the statute, the construction of the provisions of the statute as to giving bond, and whether or not the pipe line company was a public service corporation. The extent of its powers and obligations as a public service cororation were in no sense, directly or indirectly, involved.

The cases cited by Judge Miller to support his proposition are not in point, if the excerpt be interpreted as claimed by defendant, and some of them are to the contrary.

The first is *Charleston Gas Co. v. Lowe,* 52 W. Va. 622. The court there held that it was the duty to furnish gas to the people within the city who applied therefor, because the municipality had granted the franchise to the gas company for the purpose of supplying the people of that city, and the gas company had accepted the same.

The next case is *Hydro-Electric Co. v. Liston,* 70 W. Va. 83. This case was decided under the express provisions of a statute which provided that electric companies occupying highways under the Act should furnish electric service to all persons upon its lines desiring same. Here was an express statutory requirement for the supply of service along the lines.

The next case is *Calor Oil & Gas Co. v. Franzell* (Ky.), 109 S. W. 328. That case arose under condemnation proceedings, and contains nothing whatever supporting the proposition of Judge Miller.

The next case is *Olmsted v. Morris Aqueduct,* 47 N. J. L. 311. This was also a condemnation proceeding under a statute which gave the water company the right to extend its mains outside and beyond the corporate limits of the city or town which it was supplying. It contains nothing whatever to justify the statement of Judge Miller.

The next case is *Gibbs v. Consolidated Gas Co.,* 130 U. S. 395. That case involved the question of a contract to prevent competition and create a monopoly in the supply of gas to the city of Baltimore, and neither directly nor indirectly sustains the statement of Judge Miller.

Munn v. Illinois, 92 U. S. 133, the last case cited by Judge Miller, need not be analyzed to this Court to show that it is no authority for the statement of Judge Miller.

The misapplication of the authorities quoted or referred to in the brief of the State of West Virginia is well illustrated by a citation, (Defendant's brief, page 94), from Mr. Justice Clarke, in *New York v. McCall,* 245 U. S. 345. The language quoted is as follows:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

In the above case the company had a franchise to supply the inhabitants of the Third Ward of the Borough of Queens, New York. What this Court decided was that having accepted the franchise for that district it had undertaken the duty to supply the inhabitants of that district, and was therefore obligated to render adequate service to such inhabitants and extend its lines accordingly, and is not an authority for the purpose cited by the defendant.

This Court's attention is particularly directed to the fact that the statute in controversy expressly enlarges the territory to be served by the gas company over that which "is served by such" company. The statute reads:

> "furnish for public use within the territory of this state and for the use of the public and every part of the public within the territory of this State in or from which such gas is produced, or through which said gas is tranported or *which is served by such person.*"

In other words, the statute provides that the company must, in addition to the territory "which is served by such person," also serve all the other territory described, whether the gas company has devoted its property to this service or not.

That a state has no such power was held in *Atch., T. & S. F. R. R. Co. v. Railroad Commission of Cal.*, 173 Cal. 577; 2 A.L. R. 975, at page 980; *et seq*:

"Again, in *Del Mar Water, Light & P. Co. v. Eshleman,* 167 Cal. 666, 680, 140 Pac. 597, Mr. Justice Shaw, said: 'But even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility, and thus take property for public use without condemnation and payment. The provisions of this Act could not authorize the Commission to compel such corporation to dedicate additional property to public use without additional compensation. When a corporation voluntarily devotes a part of its property to public use, it is to be presumed that it makes the dedication because it is satisfied with the return which it expects to receive and in that way it is deemed to have been compensated for such dedication. But when it is forced to devote to public use additional property which it has not dedicated to public use, or is compelled to extend its service to supply uses or territory not embraced in the original dedication, it must under our constitutional provisions, as a condition precedent, be compensated for the value of the new property taken or new use exacted. This may be done under the power of eminent domain.' * * * * .

A public utility, undertaking to supply a given public need, submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken. * * * * *. But to require a public utility to devote its property to a service which it has never professed to render is to take that property, *pro tanto*, and such taking cannot be justified except under the power of eminent domain—i. e. upon just compensation."

The *Del Mar v. Eshelman* case, in 167 Cal., cited and relied upon in the above citation from the Supreme Court of California, is cited with approval and followed in *Van Dyke v. Geary*, 244 U. S. 39, by this Court in an opinion by Mr. Justice Brandeis.

(b) *The Statute Law of West Virginia, Before the Passage of this Statute in Controversy, Imposed no Obligation Upon These Natural Gas Companies of Furnishing a Reasonably Adequate Supply "For Public Use Within the Territory of this State," or, if These Express Words of the Statute be Disregarded, "For the Use of the Public and Every Part of the Public Within the Territory of This State in and From Which Such Gas is Produced or Through Which Said Gas is Transported, or Which is Served by Such Person."*

There was no statute in the State of West Virginia which purported to impose in any manner such a requirement until the statute in controversy was passed. There was such a statute relating to telegraph, telephone and electric light and power companies. (Ch. 13, Act 1907, reenacting Section 2, Ch. 4, Code of W. Va. 1899). This however was subsequently repealed.

As has already been argued, when the statutes relating to oil and gas transportation companies were passed, the State of West Virginia was anxious to encourage the development of the oil and gas industry in said State, by the transportation of oil and gas out of the State, and, accordingly, the rights and privileges to natural gas and oil transportation companies were granted without any restrictions whatever.

Under the authority cited in the original brief of the State of Pennsylvania (pages 94 to 103), and hereinabove, it has been shown that there was no such obligation under the common law, and there is no statute which so provided. This obligation, therefore, if any such exists, must be sought in the charters of these gas companies.

(c) *The Charters of The Gas Companies do Not Provide or Imply That These Natural Gas Companies as Public Utilities Owe to The State of West Virginia the Obligation of Furnishing a Reasonably Adequate Supply "For Public Use Within the Territory of this State," or if These Words of the Statute be Disregarded "For the Use of the Public and Every Part of the Public Within the Territory of this State in and from Which Such Gas is Produced or Through Which Such Gas is Transported or Which is Served by Such Person."* .....

It is significant that the State of West Virginia did not put in evidence the charters of these respective companies, to maintain its contention that these companies, or any of them, under their charters were so obligated. The State of West Virginia did put in evidence certain petitions in condemnation proceedings by some of these companies, which recited certain provisions of the charters and showed that the company was chartered to produce, transport and supply gas in West Virginia and *"elsewhere."* In almost all cases in these petitions the towns, cities or municipalities in West Virginia that were being supplied by said companies were named and specifically set forth. Two of the companies, in fact among the largest, were Pennsylvania corporations—the Carnegie Natural Gas Company and The Manufacturers Light & Heat Company—and when they entered West Virginia they then had plants and property and

supplied consumers in other States. No inference as to charter limitation can be drawn by the State of West Virginia against those companies whose charter rights have not been specifically set forth in evidence by the State of West Virginia. Some of them have already been before this Court, as the United Fuel Gas Company—containing the same provision in its charter as to supplying gas in West Virginia *"and elsewhere."*

Whatever may have been the charter powers or privileges, however, something more is required than the right or privilege or permission *in the charter* to supply certain or general territory. It must be shown either (a) that such provisions in the charter are mandatory, not merely permissive, or (b) that the company has actually engaged in the service, before such companies can be compelled to supply even the territory named in the charter.

In the case of *Northern Pacific R. R. v. Dustin,* 142 U. S. 492, this Court, by Mr. Justice Gray, said (p. 498):

> "If, as in *Union Pacific R. R. v. Hall,* 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide-water (as was held to be the case in *State v. Hartford & New Haven Railroad,* 29 Conn. 538) and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of a statute. *New Orleans etc. Ry. v. Mississippi,* 112 U. S. 12; *People v. Boston & Albany Railroad* 70 N. Y. 569.

> But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point, when it would not be remunerative. *York & North Midland Railway v. The Queen,* 1 El. & Bl. 858; *Great Western Railway v. The Queen,* 1 El. & Bl. 874; *Commonwealth v. Fitchburg Railroad,* 12 Gray 180; *State v. So. Minnesota Railroad,* 18 Minn. 40."

Where a charter is permissive and not mandatory, and there is no obligation either by contract or by profession or offer of service to enter upon those permissive services there is no unrestricted or uncontrolled power or authority at law to require such corporation to perform such public services.

See *Towers v. United R. & Elec. Co.,* 126 Md. 478.

Public Service Comm. v. Phila., B. & R. Co., 122 Md. 438.

Scranton v. Scranton R. Co., P. U. R. 1915 C 890.

This principle of law was applied to a natural gas company, and shown to be peculiarly applicable, in *Fidelity Title & Trust Co. v. Kansas Natural Gas Co.,* 219 Fed. 614 (1913). In that case, Marshall, D. J., at page 616, said:

> "But what are the limits of the duty to the state or public? There was no specific contract or charter provision, no exclusive right granted so as to imply a contract to supply the full needs of those dependent on the monopoly and for whose

interest the grant was made. The action of the state was only permissive. The company was not obligated to build any pipe line or to furnish any gas. So far as it availed itself of this permission, its property used for the quasi-public service was affected by the public interest, and its use of the property in this business was subject to valid state regulation, but it did not become a mere agency of the state, and was under no obligation, contractual or other, to increase its investment or build new lines. It did not manufacture gas. It purchased wells and transported gas by pipe line. These wells were gradually exhausted. The lines were exteneded and more distant wells obtained until the system extended into several states. The security of the bondholders is constantly dissipated by the consumption of the property, and this method has led to the insolvency of the corporation. If by its entry into Kansas the company entered into an obligation to constantly buy new wells and extend its lines to new gas fields so as to constantly furnish to the cities of Kansas an adequate supply of gas, the security of the bondholders was, indeed, illusory. The undertaking was one necessarily ending in bankruptcy.

It is well settled that a railroad company chartered to build a particular line under a permissive charter is not liable to the state for a failure to build it, and that only so far as it does build is its property affected by the public interest. *York etc. Ry. v. Regina*, 1. El. & Bl. 858, 864; *Edinburgh, etc. Ry. Co. v. Philip*, 2 Macqu. App. Cas. 526; *State v. So. Minn. R. R. Co.*, 18 Minn. 40 (Gil. 21); *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29. And *a fortiori*, that such a company cannot be required to construct a new or branch line. I know of no reason why this well-settled principle is not applicable in this case."

The absurdity of any contrary principle cannot be better illustrated than by the case under consideration. The charters in evidence provide for the supply of certain territory in West Virginia "and elsewhere." Could any community in the States of Pennsylvania, Ohio, New York, or adjoining States to West Virginia, or elsewhere, because these companies had charters to supply gas "elsewhere", compel them to extend their lines throughout Pennsylvania, Ohio, New York, Kentucky, Indiana, or even from Maine to California?

In the decision of the court in *Del Mar Water etc. Co. v. Eshleman*, 167 Cal. 666 (1914), (which is cited with approval by this Court in *Van Dyke v. Geary*, 244 U. S. 39), a thorough discussion of this question is given. It is too long to quote at length.

> "The fact that the articles of incorporation empower the company to engage in public service does not, of itself, constitute proof that it is engaged in such public service, or that it has dedicated such property as it may own to such public service. * * * The only effect of the adoption of such articles by a corporation is to give it the capacity to engage in such public service if it so desires. After having become incorporated in this manner, it has the power to engage in such service in the same sense that an individual has power to engage in such service. It may or may not do so, and until it does, it cannot be said to be subject to the jurisdiction of the railroad commission."

2nd. WHEN DOES NATURAL GAS, AFTER BEING REDUCED TO POSSESSION, ENTER INTO THE STREAM OF INTERSTATE COMMERCE?

Among the priceless gifts of nature to man, natural gas has been one of the most valuable. But the rights of property therein are peculiar. As said by this Court in *Oil Co. v. Indiana*, 177 U. S. 190:

> "The owners of the surface of the land within the gas field, whilst they had the exclusive right on their own land to sink wells for the purpose of extracting the oil and gas, had no right of property therein until by the actual drawing of the oil and gas to the surface of the earth they reduced these substances to physical possession."

Wandering hither and thither, disregarding proptery and State lines, they have been likened to animals *ferae naturae*, but in the case above quoted the want of identity of the rules of law applicable to oil and gas and to animals *ferae naturae* was clearly distinguished. The right of the public to reduce to possesion natural gas, like animals *ferae naturae*, was denied. When natural gas is once reduced to possession, as has already been shown by the authority of this and other courts (Brief filed by State of Pennsylvania) it becomes a commodity of commerce, intrastate or interstate as the case may be. After being reduced to possesion gas is always in motion on its way to market. When the shell which in all cases overlies the strata in which Nature has deposited this gas, and through which it flows, is pierced with the point of the drill of the person who has the legal right to reduce this gas to possession, the gas rushes by its power of expansion up through the tubing and casing of the well and into the line

of the natural gas company on its journey to market. As was said in the natural gas primer issued by the Smithsonian Institution, approved by George H. Ashley, State Geologist of Pennsylvania, at page 7:

> "The gas is never at rest, but is a constantly seething, moving mass, traveling in the mains at enormous velocities—at a speed many times exceeding that of the fastest trains—and requires constant attention at the well and until it is burned at the consumer's fixtures."

If it flows into the lines of one of these companies engaged in the business of supplying consumers in other States, (the large bulk of the gas in the lines being so destined for export,) then, even though such company also supplies from its lines a comparatively small percentage of this gas to consumers in the State of West Virginia, nevertheless this gas so entering the lines is in interstate commerce. Moreover, as has been shown, there being no absolute property in this gas until it is actually reduced to possession, and when it is actually reduced to possession it having been committed to interstate commerce, there is no period or time when the State of West Virginia could lay its hands upon it so as to burden, interfere with or prevent its transmission in such interstate commerce.

The decision of this Court on December 12, 1921, (not yet reported) Mr. Justice Holmes delivering the opinion, *United Fuel Gas Co. v. Walter J. Hollanan et al.*, thus refers to this interstate transportation:

> "In short the great body of the gas starts for points outside the State and goes to them. That the necessities of the business requires a much smaller amount destined to points within the State

to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the State line. *Ohio R. R. Commission v. Worthington*, 225 U. S. 101, 108; *United States v. Reading Co.*, 226 U. S. 324, 367; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 113."

This United Fuel Gas Company, which was a party to that case, is one of the seven companies referred to in the answer and brief of the State of West Virginia in the case at bar. All of the evidence in that case, as to the matters referred to by this Court, and more, is in the record in this case. In fact, under the evidence in the record before this Court in this case some of the great interstate companies occupy even a stronger position than the United Fuel Gas Company as to their interstate business.

It is not claiming too much to contend that the very instant this gas is reduced to possession by the strata being tapped by the drill, it is destined for and committed to interstate commerce. The facts have a language of their own. They speak in terms admitting

of no contradiction. If, as is conceded by the State of West Virginia, the seven great interstate companies referred to on page 21 of the brief of the State of West Virginia, sold from 1911 to 1919 inclusive, to consumers in West Virginia, only from 11% to 17% of their net supply, and the balance was transported by these companies for consumption in other States, then it follows inevitably that from 83% to 89% of this gas was at some time while in the State of West Virginia in course of transportation or transmission from the State of West Virginia to other States, and then and there committed to interstate commerce. In other words, as shown by the uncontradicted evidence, the vast bulk of the gas in the lines of these companies is in interstate commerce; or as stated by Mr. Justice Holmes, "The great body of the gas starts for points outside the State and goes to them," under contracts for the delivery thereof previously made, or to which these companies have been committed by their engagements to supply certain other companies and certain municipalities in other States. And yet the State of West Virginia proposes by the statute in controversy to compel the diversion of this very gas, this great body of the gas which has stared for points outside the State, while in transit to these points outside the State, to the supply of consumers in West Virginia, and to divert and hold it until such consumers in West Virginia shall have obtained an adequate supply, consumers in territory the gas company may never have undertaken to supply, even if thereby, as the uncontradicted evidence shows, all the gas produced in the State of West Virginia will be appropriated under the statute to supply these consumers in West Virginia, thereby preventing and prohibiting the export of any of said gas.

In fact, the State of West Virginia in its Answer claims the right, and sets forth the alleged legal grounds upon which it claims that right, to monopolize this gas. Complainants in their original brief and in this supplemental brief have already argued the unsoundness of this contention.

The *argumentum ad hominem* has been ably, ingeniously and adroitly made on behalf of the State of West Virginia that these seven great interstate companies have acquired so large a proportion of the developed and undeveloped gas territory in the State of West Virginia, that if they continue their present interstate business, consumers in West Virginia, although the gas is produced in the State of West Virginia, will be deprived substantially of all gas for consumption in said State.

As to the utter lack of foundation of allegations of monopoly or combination of the seven companies, sufficient has been said in contradiction and denial, in the original brief on behalf of the State of Pennsylvania.

The enforcement of the principle of non-interference by a State with interstate commerce, provided by the Constitution of the United States, will not lead to the result apprehended, namely, to deprive consumers in West Virginia of the use of natural gas.

It may serve a useful purpose to show from the evidence that this apprehension is a mere figment of the imagination. It may be wise to make this showing for the reasons given by Mr. Justice Holmes in his opinion in the *Northern Securities Case, viz*:

"Great cases like hard cases make bad law. For great cases are called great not by reason of

their real importance in shaping the law of the future but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well-settled principles of law will bend."

Mr. Lakin, a witness for the State of West Virginia (page 1138 *et seq.*, vol. 2, Transcript of Record, who stated his official position to be a member of the State Board of Control of West Virginia, which Board has charge of all the State educational, penal, charitable and correctional institutions) gave a list, on page 1139, of such State institutions and of the companies supplying gas to these institutions. Of these 17 institutions only 5 were supplied by any one of these seven companies, the others being supplied by local companies. This is shown at page 1155 *et seq.*, Transcript of Record. The witness testified that, while the gas service by the local companies was bad, that the service by the interstate companies was good, and that each one of the institutions that was supplied by any one of these seven interstate companies obtained good service. For example, the service of the West Liberty Normal School, supplied by The Manufacturers Light & Heat Company, the witness stated was very good. At the Spencer State Hospital at Spencer, W. Va., supplied by the United Fuel Gas Company, he stated the service was excellent. The service at the Huntington State Hospital, supplied by the United Fuel Gas Company, he stated was excellent. At the West Virginia penitentiary at Moundsville, supplied by The Manufacturers Light & Heat Company, he stated the service was very good. The service at the

West Virginia Industrial Home for Girls, of Industrial, W. Va., supplied by the Pittsburgh & West Virginia Gas Company, he stated has been very good.

Witnesses for the State of West Virginia also admitted (Vol. 2, pp. 1245 to 1250, Transcript of Record) that some of these local companies had a large acreage, one of them about 12,000 acres, of developed territory which it did not drill, and that private individuals had obtained large acreages which they had drilled and were drilling to obtain gas for use in their own plants.

At pages 1347 *et seq.*, witnesses for the State of West Virginia testified that Clarksburg and vicinity were supplied by local companies only, some of which were not public service companies. This is significant because of the testimony of Governor Cornwell that he was influenced to ask the legislature to pass the statute in controversy because of representations of shortage of gas at Clarksburg made to him by manufacturers and consumers of Clarksburg.

At pages 1001, 1002 and 1003, vol. 2, Transcript of Record, a witness for the State of West Virginia gave a table showing the acreage held in West Virginia *by natural gas utilities* on December 31, 1919, there being 48 in addition to the seven companies. This table showed that such local companies held a certain percentage of undeveloped and developed territory, as compared with the seven companies, of about 7% to 93%. Some of these local companies, however, hold large acreages both of undeveloped and developed territory.

Let it be noted, however, that this list and these figures wholly ignore the large amount of gas territory held and developed by individuals, by manufacturing corporations in the State for their own use, and by the

large number of oil companies and oil operators. Such territory so held by others than the natural gas utilities listed by the witness will approximately equal in acreage the amount held by all the gas utilities in the State, certainly the seven companies. (See Vol. 1 Exhibits, pp. 1608 to 1618.)

As was shown by the testimony, gas was being developed and produced from time to time by oil operators and wildcatters (those adventurers who take up a block of leases and drill one or more wells in the hope of finding oil or gas). The gas thus developed or produced is generally sold to the nearest gas line.

Moreover, these seven interstate companies deliver to consumers in West Virginia (see admission in brief of West Virginia, page 21) from about 11% to 18% of their whole production. Figured therefore solely with reference to the West Virginia gas utilities and consumption and deducting from the acreage holdings of the seven companies the percentage devoted to West Virginia, West Virginia would be incomparably better off than any other State. As shown by the evidence, these interstate gas companies furnish satisfactory service, so that the consumers supplied by the seven companies have no cause whatever for complaint. In other words, the shortage of gas complained of, and shown by the evidence of the State of West Virginia, to consumers in West Virginia, was occasioned by the local companies not engaged in interstate commerce, which failed to perform their function as public service companies and not by the seven interstate companies. These local companies had the same or better opportunities for securing leases, drilling wells and purchasing gas from others as had the seven companies. If they failed to embrace their opportunities for want of foresight, business judgment or capital they cannot on this account de-

mand sympathy and the ignoring of the Constitution. Had any of these seven interstate gas companies failed in their function as public service companies to supply communities served by them in the State of West Virginia, they could have been, and no doubt would have been, brought before the Public Service Commission of West Virginia, upon complaint of such communities, or some of their consumers, and orders accordingly demanded. So far as the record shows, and as the fact is, no complaint has ever been made against any of these interstate gas companies on account of any failure to fully and completely perform their public service duties to the consumers in West Virginia, nor is there any evidence that they did not fully and completely perform such duties and obligations. As was shown by the evidence the West Virginia domestic consumers have not only obtained their full proportion of the available supply, but they have been lavishly supplied as compared with all others, consuming twice as much as the consumers in Pennsylvania and five times as much as those in Ohio.

From the foregoing facts it is manifest that the apprehension that all of the gas produced in West Virginia might be taken out of the State to other States and no gas, though produced in the State, supplied to consumers in West Virginia, has nothing to justify it. When the supply of gas shall have become greatly diminished the management of the great interstate companies it must be assumed will be affected by the ordinary rules and usages of trade. Such companies in the natural course of business will find it unprofitable to transport comparatively small quantities of gas long distances, and will seek their markets nearer their sources of supply, namely, consumers in the State of West Virginia.

As stated, this argument is submitted not because complainant believes it affects the determination of the principles of law involved, or that this Court could be swerved from the straight line of judicial application of settled principles of law; yet, as stated by Mr. Justice Holmes, "great cases like hard cases make bad law," and it cannot be harmful to demonstrate that there are no hardships to consumers in West Virginia to be reasonably apprehended from an inflexible enforcement of the constitutional inhibition against State interference with interstate commerce in natural gas.

3rd. IF IN CONFLICT, WHICH ARE PARAMOUNT,—OBLIGATIONS UNDER THE CONSTITUTION AND LAWS OF WEST VIRGINIA, OR OBLIGATIONS UNDER THE CONSITUTION AND LAWS OF THE UNITED STATES?

It is unthinkable that an irresistible force can meet an immovable body. Either the power of the State of West Virginia to compel public service natural gas corporations doing business in that State to furnish to consumers in West Virginia a reasonably adequate supply of gas,—whether or not, by so compelling, interstate commerce in natural gas is interfered with, burdened, prevented or prohibited,—is the supreme law of the land; or the power of the United States to enjoin any State, including West Virginia, from interfering with, burdening, preventing or prohibiting, interstate commerce in natural gas, is the supreme law of the land.

Stripped of its dress of rhetorical plausibility, the contention of the State of West Virginia in its nakedness is this: That to enforce the duty of a public service corporation to the State of West Virginia the State

may not only burden and interfere with, but if necessary absolutely prevent and prohibit, the export of natural gas from West Virginia into other States.

It is not always easy to unflinchingly apply even thoroughly established principles of law to a fact situation where such application has a tendency to inflict on one of the parties an apparent hardship. Every case that comes before a court involves a fact situation. Thus, at this instant there is not produced in West Virginia enough natural gas to furnish a reasonably adequate supply to all of the consumers in West Virginia, domestic, industrial and others, who may now and hereafter desire the same, however wasteful may be the uses for which said gas is desired, and at the same time continue the interstate transportation of natural gas to consumers in other States, as has been the course of conduct of the business for over a generation.

Let this condition that now confronts the state be first considered with reference to the admitted fact situation which obtained when this interstate business was undertaken, instead of solely with reference to the situation in West Virginia as it exists today.

Those natural gas corporations that were incorporated in the State of West Virginia were given the right to do an interstate business. Those that were engaged in interstate business when they came into West Virginia were given the right also to do business in West Virginia. The production of gas and its consumption were of great value to the State of West Virginia. There was not enough demand in the State in the earlier stages of the natural gas development to consume but a small portion of the gas there produced. The State of West Virginia encouraged the transportation of this gas into other States, where a market there-

for could be found. It profited greatly thereby. It encouraged, permitted, acquiesced in, and authorized, the expenditure of hundreds of millions of dollars by the interstate gas companies in the development of the gas fields, the laying of pipe lines, and the building up of this interstate business. What the State of West Virginia might have done in the beginning it is not now worth while to consider. Having no title to the natural gas in the ground, and the gas not becoming an article of commerce until reduced to possession by the party having the right so to do, we are not now concerned with what if any power the State had over this gas before it was so reduced to possession.

So, too, whether or not the gas company must satisfy its consumers as they come along, those nearest getting the first service and those furthest away what is left, is not involved in this controversy, because that is what is now being done and the statute in controversy does not seek that end.

The evidence shows that interstate natural gas companies are giving their West Virginia consumers at the present time a reasonably adequate supply.

What the statute in controversy seeks to compel these interstate natural gas companies now to do is to take on in West Virginia other consumers, in territory and districts that they have never heretofore undertaken to supply, to supply to other public service corporations in West Virginia any deficit which exists upon the lines of such other public service corporations, and to discriminate against their consumers in other States in favor of every one in West Virginia who may desire to use gas for any purpose.

The statute does not undertake to equitably and ratably distribute this gas among all the consumers on the lines,—consumers in West Virginia and in other States who came on, if not by the invitation, at least by the sanction and with the approval, of West Virginia, but this statute in the boldest and baldest manner, wholly ignores the rights and claims of consumers in other States, and undertakes to discriminate in the most ruthless and cruel manner against such consumers in other states and to appropriate to the use of all persons in West Virginia who may desire to use the same all the gas produced and transported in West Virginia. In so attempting, not only is there no equity to justify this attempted wrong, but there is law to prevent its successful consummation.

It clarifies the mind, stimulates the reason, and leads to directness of application, to review even thoroughly established and elementary legal principles.

Article VI of the Constitution provides:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land * * * anything in the constitution or the laws of any State to the contrary notwithstanding."

It was said by Mr. Justice Harlan, delivering the opinion of this Court in *Northern Securities Co. v. United States,* 193 U. S., at page 335:

> "By the express words of the Constitution, Congress has the power to 'regulate commerce with foreign nations and among the several States, and with the Indian tribes.' In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power."

He quotes with approval the words of Chief Justice Marshall, in *Gibbons v. Ogden,* 9 Wheat. 1, 196, 197:

> " * * that such power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.'"

And again, (p. 345):

> "* * No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land."

And again (p. 347), referring to the power of the United States over interstate commerce, he continues:

> "* * The court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions."

While there were dissents of some of the Justices of this Court in the Northern Securities case, none of the dissenting Justices questioned these propositions, but based their dissent upon other grounds.

If, therefore, as the uncontradicted evidence in this case shows, the enforcement of this statute will inevitably result in burdening, interfering with, and in fact preventing and prohibiting, interstate commerce in natural gas by those corporations now engaged in transporting it from West Virginia to other States, then surely it must follow that whatever duty or obligation as a public service corporation any of these corporations owed to West Virginia, which duty or obligation if observed by said corporation, would bring about and cause this burden, interference, prevention and prohibition, such duty or obligation could not be enforced by the State of West Virginia.

Suppose the State of West Virginia had passed a statute which had frankly enacted:

> "All public service corporations, now engaged in West Virginia in the business of producing and transporting gas for export to other States, before exporting the same to such other States, in accordance with the custom and usage authorized and sanctioned by this State for over a quarter of a century, shall deliver to all manner of persons throughout the State of West Virginia who may desire the same, an adequate supply of gas, even though the effect thereof will be to consume all of the gas in West Virginia, and prevent the carriage of any thereof outside of the State."

Would such a law be constitutional? Under the express terms of the statute in controversy and the evidence in this case, wholly uncontradicted, that is substantially what the enforcement of the statute in controversy would effect. That effect is what the State of West Virginia avows in its Answer it seeks by the statute in controversy to accomplish, and declares in its Answer it has the right so to do.

The charm "the obligations to the public of the State of the public service corporations of the State," is the abracadabra by whose magic the State would ward off the power of the Nation and would overthrow the mandate of the Constitution of the United States with a statute of the State of West Virginia. It is submitted that the magic of the charm has been overestimated; it is not so prodigiously potent.

Respectfully submitted,

GEORGE E. ALTER,
Attorney General.
A. LEO. WEIL,
Attorneys for Complainant.

APPENDIX.

Exhibit "A."

A JOINT RESOLUTION

Authorizing action by the authorities of this Commonwealth to prevent discrimination against the citizens of this Commonwealth in the use of natural gas which would result from the law recently enacted by the State of West Virginia.

Whereas There are millions of domestic and hundreds of industrial consumers of natural gas citizens of this Commonwealth who have expended enormous sums of money to equip their houses and plants respectively with appliances adapted for burning this fuel and to restrict and diminish the supply to any considerable extent would affect the domestic consumers in their health, their comfort their convenience and their welfare would subject them to enormous property losses in rendering useless their present appliances and necessitating the substitution of others in many cases requiring the reconstruction of dwellings while the industrial consumers if thus restricted and the supply of gas greatly diminished would not only suffer great loss but be placed at a disadvantage in competition with manufacturers in other States where by law an adequate supply was provided.

And Whereas Citizens of this Commonwealth have invested hundreds of millions of dollars in the exploration for and the development of natural gas wells and fields in the State of West Virginia and in the installation of transportation systems for the transmission of the gas thus found from West Virginia into Pennsylavania in order to obtain a supply for its citizens and to this end have made contracts and entered into obligations with cities and boroughs as well as with industrial plants and others and

Whereas The citizens of said cities and boroughs and the owners of said industrial plants and others are to a large extent dependent upon and have relied for their supply upon the gas transported from the State of West Virginia into the State of Pennsylvania the natural gas available from other sections being wholly inadequate a large proportion of said gas now consumed in Pennsylvania coming from West Virginia and

Whereas In order to restrain and restrict the transmission of this gas from West Virginia into Pennsylvania and to discriminate against the citizens of Pennsylvania and in favor of the citizens of West Virginia the State of West Virginia on the seventeenth day of February one thousand nine hundred and nineteen did enact a law the effect whereof is that the gas produced in said State should be first applied to the full satisfaction of all the domestic, industrial and other demands of the citizens of that State before any thereof could be transmitted into Pennsylvania thus disregarding the rights of citizens of Pennsylvania and the obligations of their contracts and

Whereas By cumulative fines and penalties civil and criminal said law of West Virginia is designed to deter

parties engaged in the production and transmission of natural gas in West Virginia into Pennsylvania from instituting legal proceedings to have tested and adjudicated the right of said State so to restrict and prevent the transmission of gas from West Virginia until after all of the demands of its citizens have been first adequately supplied and

Whereas The citizens of this State who will suffer in their health, comfort, convenience, welfare and property by the enforcement of this law are without remedy or redress except through action by this Comonwealth and

Whereas The enforcement of said law of West Virginia would be in conflict with the Constitution of the United States which inhibits the placing of burdens and restraints upon interstate commerce and prevents laws impairing the obligation of contracts and

Whereas The framers of the Constitution of the United States by the provisions of said Constitution sought to prevent any State from husbanding and applying its natural resources solely for the benefit of its own citizens to the detriment and loss of the citizens of other States well knowing if this policy were pursued it would result in reprisals and all of the evils attendant thereon and vested in the Federal courts the power to prevent any State from entering upon any such course of conduct now therefore

Be it Resolved By the Senate of the Commonwealth of Pennsylvania with the concurrence of the House of Representatives that the Attorney General be and he is hereby authorized and directed to institute such legal proceedings and to do all other acts necessary to protect the rights and interests of the Commonwealth of

Pennsylvania and of its citizens from any and all violation or infringement by the State of West Virginia or by any of its constituted authorities under or in pursuance of said law of West Virginia affecting or intended to affect consumers of natural gas in Pennsylvania.

E. E. BEIDLEMAN,
President of the Senate.

ROBERT S. SPANGLER,
Speaker of the House of Representatives.

Approved—The 18th day of April, A. D. 1919.

WM. C. SPROUL.